

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

JEFFREY ROSS SEERY,	§	
TDCJ CID NO. 1706643,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. 6:15cv454
	§	U.S. Magistrate Judge Mitchell
LORIE DAVIS, Director,	§	
Texas Department of Criminal	§	
Justice, Correctional Institutions	§	
Division,	§	
Respondent.	§	

**RESPONDENT'S OBJECTIONS TO THE MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION**

While the Director agrees with the Magistrate Judge's ultimate recommendation to deny the petition, the Director must object to those findings and conclusions with which she disagrees. *See Douglass v. United Services Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996). Otherwise, she will be barred from challenging the same on appeal. Consequently, these objections are made in an abundance of caution to perfect the record for appeal.

First, the Director objects to the Magistrate Judge's failure to find that the claims raised in Seery's amended petition are time-barred. ECF 37, at 9-10. The Director respectfully disagrees with the statement that the Director's analysis of the time-bar issue omitted a crucial point, the factual predicate date. *Id.* at 10. Rather than omitting this issue, the Director argued that Seery failed to demonstrate he could not have discovered the factual predicate of his amended claims until a date subsequent to the date his conviction became

final. ECF 34, at 7-8; *see* 28 U.S.C. § 2244(d)(1)(D). As argued, the availability of Seery's amended claims prior to the end of the limitations period was evidenced by the Texas Court of Criminal Appeals' dismissal of his third state habeas application as an abuse of the writ. SHCR-03, at Action Taken. A subsequent state application for writ of habeas corpus will be dismissed as an abuse of the writ where the factual basis of a claim is ascertainable through the exercise of due diligence on or before the date the previous state application was filed. Tex. Code Crim. Proc. Art. 11.07 § 4(c). In dismissing Seery's third state habeas application as an abuse of the writ, the Texas Court of Criminal Appeals necessarily found that Seery's amended claims were available to him at the time of his previous habeas application. *Id.* Accordingly, the date Seery's convictions became final controls the calculation of the federal limitations period and the amended claims are untimely. 28 U.S.C. § 2244(d)(1).

Second, the Director objects to the Magistrate Judge's failure to find that one of Seery's claims is unexhausted and procedurally barred—his claim that the appellate court incorrectly determined that the trial court properly allowed evidence that Seery lied about his service. ECF 37, at 4, 24-27. As the Director argued in her answer, Seery has not exhausted claim 4(c) because, while he raised it on direct appeal, he abandoned it on petition for discretionary review and did not raise it in his state writ application. ECF 13, at 14-16.

The Director respectfully requests that Seery's claims be denied and dismissed with prejudice for the reasons set forth in the Respondent's Answer and the Respondent's Response to the Amended Petition.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE McFARLAND
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

*Lead Counsel

/s/ Jessica Manojlovich
JESSICA MANOJLOVICH*
Assistant Attorney General
State Bar No. 24055632

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
(512) 936-1280 (FAX)

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing pleading is being served by placing the same in the United States Mail, postage prepaid, on the 9th day of January, 2019, addressed to:

Jeffrey Ross Seery
TDCJ-CID No. 1706643
Estelle Unit
264 FM 3478
Huntsville, TX 77320

/s/ Jessica Manojlovich
JESSICA MANOJLOVICH
Assistant Attorney General